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In The
Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH,
Petitioner,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF HOME BUILDERS
IN SUPPORT OF PETITIONER**

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INTERESTS OF AMICUS CURIAE

The National Association of Home Builders (NAHB) has received the parties' written consent to file this *amicus curiae* brief in support of Petitioner.¹

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 200,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes each year in the United States.

NAHB is a vigilant advocate in the Nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in another Clean Water Act (CWA) case, *NAHB v. Defenders of Wildlife*, 127 S.Ct. 2518

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

(2007). It has also participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive regulation under a wide array of statutes and regulatory programs. See Appendix A.

NAHB's organizational policies have long advocated that the federal courts must be available for landowners to adjudicate their rights and duties arising under federal law. The court of appeals' decision undermines this chief objective of *amicus*. As a result of the fragmented opinion in *Rapanos v. United States*, property owners must determine the extent of CWA jurisdiction by "feel[ing] their way on a case-by-case basis." 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Land owners presently lack any clear understanding of whether an otherwise ordinary aquatic feature on their property, such as a creek, pond, or wetland, will be deemed within the control of the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) as they administer the CWA's massive bureaucracy.

Such sprawling regulatory encroachment is compounded by the court of appeals' decision, which shields the agencies' "jurisdictional determinations" (JDs) from impartial judicial review. As a result, property owners have no choice but to abide by overly-zealous and unreasonable assertions of CWA jurisdiction – or else they will become targets of a Corps or EPA enforcement action. The agencies can thus roam at will because

they have no real apprehension that a federal judge might question the breadth of a particular JD.

The Court should grant certiorari to confirm that the federal court forum is available to land owners. It can thereby restore some balance to the lop-sided and unjust system by which the Executive Branch subjects private property to CWA jurisdiction.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS WITH THIS COURT'S DECISIONS AND THOSE FROM OTHER CIRCUITS.

A. Conflict With This Court's Decisions, Including *Bennett v. Spear*.

The court of appeals withheld judicial review of a Corps JD regarding wetlands on Fairbanks's property, reasoning that such a determination is not "final agency action" under the Administrative Procedure Act (APA). *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 597 (9th Cir. 2008). Certiorari is warranted because the opinion below decides an important federal question in a manner that conflicts with this Court's decisions, in particular *Bennett v. Spear*, 520 U.S. 154 (1997). S.Ct. Rule 10(c).

Bennett set forth the two-part test to decide when agency action is final for purposes of APA

review. First, the action "must mark the consummation of the agency's decision making process." *Bennett*, 520 U.S. at 177-178. The court of appeals acknowledged that the Fairbanks JD met the first prong of the *Bennett* test, because it "announces the Corps' considered, definite and firm position about the presence of jurisdictional wetlands." *Fairbanks*, 543 F.3d at 593.

Error lies in the court of appeals' consideration of *Bennett*'s second element: agency action is final if it is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotes omitted). The opinion below provides that the JD at issue was not final because legal obligations arose "solely from the CWA, and not from the Corps' issuance of an approved jurisdictional determination." *Fairbanks*, 543 F.3d at 594. Certiorari should be granted because the Ninth Circuit's analysis strips the "rights or obligation" prong of all meaning.

The CWA prohibits "discharges" into statutory "navigable waters" unless authorized under the permit provisions of section 402 ("any pollutant") or section 404 ("dredged or fill material"). 33 U.S.C. §§ 1311, 1342(a), 1344(a). In *Bennett*'s parlance, a landowner has an "obligation" to obtain a section 404 permit if he wants to discharge dredged or fill material into jurisdictional wetlands on his property, and faces the "consequences" of violating federal law and CWA enforcement if those resources are filled without the requisite permit.

Simply put, if private property contains covered wetlands, the landowner must get agency approval to fill them. The presence of CWA waters on private land shapes behavior, alters legal relationships, and creates responsibilities that do not exist on property *without* statutory "navigable waters."

The court of appeals stated that "[a]t bottom, Fairbanks has an obligation to comply with the CWA," and then arrived at the *non sequitur* that legal obligations "arise directly and solely" from the statute and not the Corps's JD. *Fairbanks*, 543 F.3d at 594. That is illogical and circular. Of course Fairbanks has the CWA obligation to avoid filling jurisdictional wetlands. The very reason that the Corps issued the JD was to implement the CWA and impose upon Fairbanks the duty to avoid filling jurisdictional waters without first procuring section 404 approval. The CWA's permit sections are not self-executing; the federal government cannot indiscriminately claim section 404 authority over private land unless it determines that statutory "navigable waters" exist there. Especially in light of the confusion since *Rapanos*,²

² At least eight petitions have been submitted to this Court to resolve the confusion surrounding CWA jurisdiction in the wake of *Rapanos*. See *Gerke Excavating, Inc. v. United States*, 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 45 (2007); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S. Ct. 375 (2007); *No. Cal. River Watch v. City of Healdsburg*, 496 F.3d 999 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1225 (2008); *United States v. Heinrich*, 184 Fed. Appx. 542 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2974 (2007); *United States v. Morrison*, 178 Fed. Appx. 481 (6th Cir. 2006),

as a practical matter most landowners do not ordinarily know if their property contains aquatic resources within federal CWA jurisdiction. They are accordingly unaware whether they need a discharge permit until and if the Corps determines that "navigable waters" are present. Thus, a landowner's legal rights and obligations are "fairly traceable" to the Corps's issuance of an approved JD. See *Bennett*, 520 U.S. at 170-71. Consequences can be avoided or redressed if a court strikes an agency's unreasonable assertion of CWA jurisdiction through APA review.

If the court of appeals' analysis stands, then the agency action in *Bennett* would never have been exposed to judicial review. *Bennett* involved a challenge against a Fish and Wildlife Service (FWS) biological opinion issued under the Endangered Species Act (ESA). The biological opinion concluded that operation of a proposed irrigation project would likely "jeopardize the continued existence" of two fish species unless "reasonable and prudent alternatives" were imposed to maintain minimum water levels in a lake and reservoir. 520 U.S. at 159. Federal obligations to avoid jeopardy through consultation, and develop a biological opinion offering reasonable and prudent alternatives, derive from the text of

cert. denied, 127 S. Ct. 270 (2007); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 1258 (2007); *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2963 (2008); *Lucas v. United States*, 516 F.3d 316 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 116 (2008).

ESA section 7. See 16 U.S.C. §§ 1536(a)(2), (b)(3)(A).

Under the court of appeals' reasoning, the biological opinion in *Bennett* would not be "final agency action" because the obligations to avoid species' jeopardy and develop reasonable and prudent alternatives stem from the ESA's very language. Yet, this Court found that the biological opinion *itself* imposed rights and obligations, and thus FWS's very action was amenable to APA review. *Bennett*, 520 U.S. at 178. This Court did not adopt the court of appeals' fiction that FWS's action was off-limits to court review because the obligation to avoid species' jeopardy flowed from the underlying ESA statute.³ Likewise, whether the Corps was too zealous here in determining the breadth of "navigable waters" on Fairbanks's property should not be shielded from judicial scrutiny, just because the CWA establishes the basic prohibition against discharges into covered wetlands without a permit.

³ Similarly, under the National Environmental Policy Act (NEPA), agencies must develop an environmental impact statement (EIS) for any "major action significantly affecting the human environment." 42 U.S.C. § 4332(C). Under the Ninth Circuit's reasoning, an EIS would not be a final agency action, because the requirement to develop it and its substance emanates from NEPA. *Id.* Yet, it is well settled that a final EIS is a final agency action for purposes of APA review. See *Or. Nat. Desert Ass'n. v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1139 (9th Cir. 2008) (listing the courts of appeals that have found an EIS is a final agency action).

Nor did *Bennett* resort to the confusing and undecipherable distinction drawn by the court of appeals, between a "legal consequence" of an agency action that supports a conclusion of APA finality and a "practical effect" of that same action which does not. *Fairbanks*, 543 F.3d at 595-96. Rather, *Bennett* recognized that a biological opinion, which "theoretically serves an 'advisory function' ... in reality has a powerful coercive effect." *Bennett*, 520 U.S. at 169. So too with JDs. The Corps and EPA generally do not "choose[] to deviate" from their determinations of CWA jurisdiction and suddenly allow parties to fill covered wetlands without a permit. See *id.*; Cf. *Nat. Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (EPA does not have the authority to exempt classes of dischargers from CWA permitting requirements).

Moreover, in NAHB's experience, when its members are constrained by Corps JDs, they do not blithely ignore them lest they be faced with serious enforcement and penalty issues. "[W]e are to apply the finality requirement in a 'flexible' and 'pragmatic' way." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); see also *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435-36 (D.C. Cir. 1986). To that end, this Court and other lower courts advise that whether an action is final for APA review should be assessed from the vantage point of a regulated entity that is the object of the agency's decision. An agency action is final if it is " 'definitive' " and has a " 'direct and

immediate ... effect on the day-to-day business' " of the party challenging it. *FTC v. Standard Oil Co.*, 449 U.S. 232, 239, (1980) (quoting & citing *Abbott Labs.*, 387 U.S. at 152). Certainly from the perspective of Fairbanks and private land owners, a JD from the Corps is not an "otherwise idle ... statement of agency policy" but rather "carr[ies] easily-identifiable legal consequences for the ... would-be dischargers." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1279 (D.C. Cir. 2006).

To conclude, if the court of appeals' reasoning stands, then agencies could always evade APA review simply by claiming their actions have no legal effect, but merely stem from authorizations and responsibilities imposed by Congress. Theoretically, all agency decisions should have *some* grounding in a piece of authorizing legislation. Certiorari should be granted to review the court of appeals decision, bring it in line with this Court's precedent, and allow land owners the chance to seek court review of Corps JDs that assert federal control over their real property.

B. Conflict With Other Circuits.

The court of appeals' holding contradicts other circuits that have exercised judicial review to decide the merits of whether specific resources are deemed "navigable waters of the United States" under the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. § 401 et seq.

Similar to the CWA, the RHA "requires that a permit be obtained from ... the Army Corps of Engineers, for any activity which takes place in navigable waters of the United States, or which affects the capacity of such waters." *Swanson v. United States*, 789 F.2d 1368, 1371 (9th Cir. 1986).⁴ For RHA purposes, "navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (2008) (Corps regulation). These features are referred to as "traditional navigable waters," defined by seminal opinions such as *The Daniel Ball*, 77 U.S. 557 (10 Wall. 557) (1871), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940). Traditional navigable waters are "what Congress had in mind as its authority for enacting the CWA." *Solid Waste Agency of N. Cook. County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).⁵ Contrary to the court of appeals' opinion, after the Corps makes a "navigable water of the United States" determination, other circuits have invoked APA review to adjudicate RHA jurisdictional decisions.

⁴ The Rivers and Harbors Act requires a permit "for structures and/or work in or affecting navigable waters of the United States." 33 C.F.R. § 322.3 (2008).

⁵ However, this Court appears unanimous in holding that the CWA covers more than just traditional navigable waters. See *Rapanos v. United States*, 547 U.S. 715, 731 (2006) (plurality).

For example, in *Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630 (11th Cir. 1995), property owners along Fisheating Creek erected fences, felled trees, and posted "no trespassing" signs to keep the public from using the Creek. Subsequently, the Corps prepared a report, finding that Fisheating Creek was a "navigable water of the United States." Lykes Brothers "brought a civil action pursuant to 5 U.S.C. § 704 against the [Corps] seeking to review and set aside the [agency's] determination that Fisheating Creek ... is a navigable water of the United States" *Id.* at 633 (emphasis added). Significantly, the Lykes Brothers invoked the APA to obtain judicial review over the Corps's action. After a 17-day trial and "expending a great amount of time to fully digest the voluminous testimony, enough exhibits to fill every wall of the courtroom, and the learned memoranda of the parties," the trial court concluded that Fisheating Creek was *not* a "navigable water of the United States." *Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 821 F. Supp 1457, 1458 (M.D. Fla. 1993). On appeal, the Eleventh Circuit reviewed the factual findings and found no error in the trial court's decision. Thus, the *merits* of the Corps's decision was tried and appealed – all without raising the question of whether the Corps's decision regarding the Creek's jurisdictional status was final agency action. See also *United States v. C.E. Harrell*, 926 F.2d 1036 (11th Cir. 1991) (reaching the merits and overturning Corps's determination that Lewis Creek was a navigable water of the United States, even though no permits had been sought to use the

waterbody and without any question of whether the agency's action was final).

Similarly, in *Loving v. Alexander*, 548 F. Supp 1079 (D.C. Va. 1982), *aff'd*, 745 F.2d 861, 863 (4th Cir. 1984) approximately 67 riparian land owners sought a "judgment declaring that the Jackson River is nonnavigable from the mouth of Dunlap Creek . . . to the base of the Gathright Dam" 548 F.Supp. 1079. The district court upheld the Corps's assertion of RHA jurisdiction, found its "determination of navigability is an agency action," and decided that the "plaintiffs . . . stated a cause of action under the [APA]." On appeal, the Fourth Circuit recognized that "navigability is a term that has traditionally been defined by decisions of federal courts" and affirmed the district court's decision. *Loving*, 745 F.2d at 864. See also *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 747 (9th Cir. 1978) (reaching the question of Corps jurisdiction even though the suit "did not involve action or inaction by the Corps on any particular application by [the plaintiff] for a permit under the Rivers and Harbors Act or the [CWA]," because the plaintiff refused to apply for a permit).

Thus, the circuit courts have routinely treated jurisdictional determinations completed under the RHA as final agency action subject to APA judicial review. In light of this Court's recognition in *SWANNC* and *Rapanos* that traditional navigable waters provide the basis for the CWA's scope, and the fact that both the CWA and RHA have similar permitting processes, *Fairbanks* cannot be

reconciled with other circuit court decisions that address the merits of Corps assertions of authority over the "navigable waters of the United States." If there is a reason why the Corps's RHA jurisdictional determinations are final agency action subject to judicial review but the Corps's CWA determinations are not, then this Court should grant certiorari to clarify any basis for such a distinction.

II. THE CORPS ITSELF TREATS CWA JURISDICTIONAL DETERMINATIONS AS HAVING BINDING, LEGAL EFFECT.

The Corps's litigating position, that JDs issued under the CWA are not final agency action, is belied by its own regulations and policies.

To wit, the agency's regulations state that JDs are "Corps final agency action." 33 C.F.R. § 320.1(a)(6).

And, recent guidance provides further confirmation of the agency's regulatory position (if not the one it has argued to the court of appeals). On June 26, 2008, the Corps issued Regulatory Guidance Letter No. 08-02, on the subject of JDs⁶ (hereinafter RGL 08-02). In RGL 08-02, the agency addresses the differences between "preliminary" jurisdictional determinations and "approved" jurisdictional determinations. The Corps describes preliminary determinations as non-binding, but

⁶ Available at <http://newsletters.wetlandstudies.com/docUpload/RGL08021.pdf> (last visited March 18, 2009).

describes an *approved* determination as "an official Corps determination that jurisdictional 'waters of the United States,' or 'navigable waters of the United States,' or both, are either present or absent on a particular site." RGL 08-02 at 1. The agency's own description of an approved determination is thus a far cry from a "bare statement of [its] opinion." *Fairbanks*, 543 F.3d at 593.

Furthermore, RGL 08-02 highlights the rights, obligations, and legal consequences that stem from an approved jurisdictional determination:

An approved JD:

- (1) constitutes the Corps' official, written representation that the JD's findings are correct;
- (2) *can be relied upon by a landowner, permit applicant, or other "affected party" (as defined at 33 C.F.R. 331.2) who receives an approved JD for five years* (subject to certain limited exceptions explained in RGL 05-02);
- (3) *can be used and relied on by the recipient of the approved JD* (absent extraordinary circumstances, such as an approved JD based on incorrect data provided by a landowner or consultant) if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner or other "affected party," challenging the legitimacy of that JD or its determinations; and

(4) can be immediately appealed through the Corps' administrative appeal process set out at 33 CFR Part 331.

RGL 08-02 at 2 (emphasis supplied). One would certainly think that an approved JD carries with it legal rights if it can be relied upon for five years as against the Corps and EPA, and can further be used to defend against a CWA citizen suit.

It is hard to understand how the Corps can develop this policy less than a year ago, and now argue that approved JDs do not affect rights or obligations or produce legal consequences. The Court should grant certiorari to integrate the law on final agency action with the Corps's policy on "approved" JDs.

III. A CWA JURISDICTIONAL DETERMINATION HAS MANY CONSEQUENCES BEYOND THE CORPS PERMIT PROCESS.

The court of appeals' conclusion that a wetlands JD does not impose obligations, deny rights, or fix legal relationships except in the context of a "permit application or enforcement proceeding" (*Fairbanks*, 543 F.3d at 595), is simply wrong. That view is grounded in neither practical business reality nor an adequate understanding of modern environmental and "green building" programs. There are many instances in which a property owner would seek a determination as to whether wetlands are subject to federal CWA jurisdiction,

aside from the section 404 permitting process or agency-initiated enforcement. Indeed, a landowner should simply have a right to know if her property contains resources subject to federal agency regulation, even if she does not want to incur the time and expense of obtaining a 404 permit.⁷

In any event, various economic and legal consequences flow from jurisdictional determinations and impact the value and usability of land.

A. The Value of Real Property is Impacted by a Jurisdictional Determination.

The value of real property is influenced by the "highest and best use"⁸ options available to the owner. The presence of federally-regulated wetlands will often decrease the options available to an owner and prospective purchaser of real property. The resulting uncertainty may cause a significant reduction in value. Due to these high

⁷ "The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a Nationwide permit spends 313 days and \$28,915 – not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 719 (plurality opinion).

⁸ A leading group representing the interests of the real estate appraisal industry defines "highest and best use" as: "The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible and that results in the highest value." Appraisal Institute, *The Appraisal of Real Estate*, 13th ed. 277-278 (Chicago: Appraisal Institute ed., 2008).

risks, the identification of federally-regulated wetlands has become a routine part of many real estate transactions.

Consider for example the investor who holds an option contract to purchase certain unimproved land. As part of the due diligence process the investor needs to determine whether such land contains a CWA "navigable water." In turn, the existing owner must request a JD from the Corps. The Corps, in turn, issues a positive determination indicating the presence of jurisdictional wetlands. Assuming the wetlands consume the property line which is coincident with the edge of the public roadway, access to the property may be severely restricted. If the wetlands pock-mark the property, the buildable envelope may be reduced or eliminated entirely. The investor must also consider whether authorization to alter the wetlands can be secured, the time and expense of securing such authorizations (including mitigation costs), and any past CWA violations or possible future enforcement actions. See Randall S. Guttery, Stephen L. Poe & C.F. Sirmans, *An Empirical Investigation of Federal Wetlands Regulation and Flood Delineation: Implications for Residential Property Owners*, 26 J. Real Estate Research, No. 3, at 303 (2004); Margaret N. Strand, *Wetlands: Avoiding the Swamp Monster*, in *Environmental Aspects of Real Estate Transactions*, From Brownfields to Green Buildings 720, 721 (James B. Witkin 2nd ed., 1999). Each of these considerations flow from a determination that CWA-covered resources exist on the real estate

in question and will profoundly impact its market value.

Similarly, a lender will always want to assess the value of real property before advancing any funds. As an executive for the Maryland Bankers Association remarked on loans secured by unimproved land, "Unless we have a reason to know that it is or isn't a wetland, we just don't know the value of it."⁹ A JD will be considered alongside any private restrictions, zoning, building codes, historic district controls and other environmental regulations to reach a reasonable market value opinion. In addition, a JD will trigger a marked increase in the amount of site feasibility documentation required by the lender for loan approval. This will directly affect the borrower's investment and development choices by increasing the length of time required to secure loan approval, the types of outside consultants needed to produce necessary documentation, and the costs associated with both. D. Linda Kone, *Land Development*, 50-51 (National Association of Home Builders, 18th ed. 1994).

⁹ William Bunkley, Charles P. Edmunds, *Appraising Wetlands*, *Appraisal Journal* (1992) (quoting John Bowers, Jr., Executive Vice President, Maryland Bankers Association), available at http://www.entrepreneur.com/tradejournals/article/12085965_1.html (last visited on Mar. 20, 2009).

B. Some States Require Real Property Owners to Disclose The Presence of Wetlands to Buyers.

JDs also have significant legal consequences for owners of real property in terms of disclosures to prospective purchasers. Recognizing the potentially devastating impact a JD may have on property value, a number of states now impose strict wetland disclosure obligations on sellers of residential real property.

In Louisiana, under Act 308 of the 2003 Louisiana Legislature, the seller must disclose whether "any part of the property [has] been determined a wetland by the United States Army Corps of Engineers under § 404 of the Clean Water Act," attach a copy of the JD, and provide notice that additional costs for a section 404 permit may result. La. Rev. Stat. Ann. §9:3195-3199 (2008). The requirement to disclose the presence of CWA-covered wetlands is made a basic part of a real estate sales transaction through the Louisiana Residential Property Disclosure form.¹⁰

In Hawaii, the seller is required to provide the purchaser with a disclosure statement that fully and accurately exposes all known or reasonably discoverable "material facts" relating to the property. Haw. Rev. Stat. Ann. § 508D-1 (2008). "Material facts" are defined as "any fact, defect, or

¹⁰ Available at <http://www.lrec.state.la.us/Residential%20Property%20Disclosure%202003-01-08.pdf> (last visited Mar. 17, 2009).

condition, past or present, that would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale." *Id.* Because a Corps wetland determination measurably impacts the value of property, such determination would need to be disclosed to all prospective purchasers. In Florida, wetlands constitute a material fact affecting property value and appear as a disclosure item on the Florida Association of Realtors Property Disclosure Statement. Fla. Stat. Ann. § 475.278 (2006).¹¹ See also, R.I. Gen. Laws § 5-20.8-2(b)(2)(xxix) (2008) (requiring disclosure of all "material facts" regarding the property, including the location of coastal wetlands, fresh water wetlands, marshes or swamps that may impact future development). The seller of residential real property in Oregon faces a similar duty to disclose "any governmental studies, designations, zoning overlays, surveys or notices that would affect the property." Or. Rev. Stat. § 105.464 (2009).

Likewise, the Maryland Code requires the seller to disclose general "land use matters." Md. Code Ann., [Real Prop.] § 10-702 (2007). Interpretation of what this covers is left up to the State Real Estate Commission. *Id.* The standardized seller disclosure and disclaimer form developed by the State Real Estate Commission explicitly covers

¹¹ <http://www.sellinghomemadeeasy.com/forms/Florida.pdf> (last visited Mar. 20, 2009).

wetlands.¹² Leaving no room for interpretation, the Wisconsin Code includes a report form entitled Real Estate Condition Report Disclaimer. Wis. Stat. § 709.03 (2008). Part C.11 of the report requires disclosure of all “floodplain, wetland or shoreland zoning area[s].” *Id.*

While these wetland disclosure obligations will place the prospective purchaser in a more informed position regarding pitfalls associated with the property, they also have the effect of commanding the property owner to affirmatively disclose the presence of regulated wetlands. Failure to do so may trigger legal consequences sounding in breach of contract, fraudulent concealment, and negligent misrepresentation.

C. A Project’s “Green” Rating can be Affected by a Wetlands Jurisdictional Determination.

“As the environmental impact of buildings becomes more apparent, a new field called ‘green building’ is gaining momentum.”¹³ “Green building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building’s life-cycle

¹² Maryland Residential Property Disclosure and Disclaimer Statement, available at <http://www.dllr.state.md.us/forms/dandddform.doc> (last visited Mar. 20, 2009).

¹³ EPA Green Building Home Page, <http://www.epa.gov/greenbuilding> (last visited Mar. 16, 2009).

from siting to design, construction, operation, maintenance, renovation and deconstruction.”¹⁴ As illustrated by EPA’s definition, green building, involves not only how buildings are constructed, but also *where* they are constructed. Whether wetlands are impacted is important in this calculation.

For example, the American National Standards Institute (ANSI) recently approved the International Code Council’s National Green Building Standard, which establishes “practices for the design and construction of green residential buildings, building sites, subdivisions and renovation thereof.” International Code Council, *National Green Building Standard*, 700-2008, § 101.3 (2009) (NGB Standard). Under the NGB Standard, projects are awarded points for using green building practices. One such practice is avoiding environmentally sensitive areas, including wetlands. *Id.* §§ 202, 403.11. Significantly, the NGB Standard’s definition of “wetland” is identical to that of the Corps at 33 C.F.R. § 328.3(b). Therefore, the presence of CWA-covered wetlands on site is relevant to a project’s green rating, regardless of whether a section 404 permit is procured.

¹⁴ EPA Green Building. Basic Information, <http://www.epa.gov/greenbuilding/pubs/about.htm> (last visited Mar. 16, 2009).

Similarly, Green Communities, which provides funds and expertise to enable developers to build affordable homes that are better for the environment, has created criteria that must be met before a developer is eligible for a Green Communities grant. *Green Communities Criteria 2008*, 4 (2008), <http://www.practitionerresources.org/cache/documents/666/66641.pdf>. One of the Green Communities mandatory criteria requires that a development not be located within 100 feet of a wetland. *Id.* at 6, 16 (2008). Again, Green Communities uses the federal government's regulatory definition of wetlands. Under this program, a jurisdictional determination would negatively impact a developer's green rating if he planned to place a building within 100 feet of a wetland, even though he would not need a section 404 permit.

D. Certain EPA Construction Grants do not Allow Filling of Wetlands.

When the Corps concludes that an area is a jurisdictional wetland it has a direct effect on whether a project can connect to certain sewage treatment plants. The CWA allows EPA "to assist the development and implementation of waste treatment management plans and practices ..." 33 U.S.C. § 1281(a). Specifically, the Act authorizes the Agency "to make grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works." 33 U.S.C. 1281(g)(1); see also

Shanty Towns Assocs. Ltd. P'ship v. EPA, 843 F.2d 782, 785 (4th Cir. 1988). According to EPA regulations governing its construction grant program, the agency will not award a construction grant unless the Regional Administrator determines that the treatment system "would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands" 40 C.F.R. § 35.925-13.¹⁵

In practice, EPA conditioned grants for some treatment plants to ensure a community does not allow wastewater discharges to the plant if the wastewater originates from a facility which is erected in a jurisdictional wetland. Thus, even if a property owner can obtain a section 404 permit in those communities, once the Corps determines that an area is a "wetland," the property owner cannot obtain approval to discharge wastewater into the treatment plant. In many instances this makes the property undevelopable and puts an end to the proposed project.

¹⁵ EPA now assists with the construction of wastewater treatment plants through with Clean Water State Revolving Funds, as appropriations under the CWA ended in 1990. 33 U.S.C. § 1285.

**E. The Rights of Eligible Communities
Under the National Flood Insurance
Program are Impacted by Wetlands
Determinations.**

The National Flood Insurance Program (NFIP) makes federally-backed flood insurance available to eligible communities that have adopted land use measures that are consistent with the minimum criteria established by the Federal Emergency Management Agency (FEMA). 42 U.S.C. §§ 4022(a), 4102(c). One section of the National Flood Insurance Act establishes an incentive-based program called the Community Rating System (CRS). 42 U.S.C. § 4022(b). Through insurance discounts, CRS encourages communities to undertake floodplain management measures that go beyond the minimum land use criteria for NFIP eligibility. *Id.*

Residents of CRS communities that conduct advanced activities receive reductions in their flood insurance premiums. The more "points" a community obtains, the greater the reduction in the premiums that must be paid. According to FEMA, the "reductions range from 5% to 45% annually, depending on the rating the community earns by carrying out CRS-qualified tasks."¹⁶

¹⁶ FEMA, *NFIP/CRS Update*, February 2009, <http://www.fema.gov/library/viewRecord.do?id=3297> (last visited Mar. 10, 2009).

Among the ways that communities can improve their CRS rating is by protecting wetlands. For example, if a community requires real estate agents to disclose flood related hazards, such as wetlands to buyers, the community can obtain rating points.¹⁷ Similarly, communities obtain points for preserving certain open space, including wetlands.¹⁸

Therefore, once the Corps has determined that certain areas in a CRS community are wetlands, that community cannot obtain CRS "points" if it allows the property owners to develop those areas. Thus, the manner in which a community treats features that the Corps considers jurisdictional under the CWA can impact the cost of flood insurance for its citizens.

* * *

To conclude, there are many examples of legal rights and obligations that flow from a Corps determination that properties contain CWA jurisdictional waters, including wetlands. The court of appeals was simply incorrect in maintaining that a JD is not final agency action because such a determination only takes on consequence in the context of a section 404 permit application or a CWA enforcement action.

¹⁷ FEMA, *NFIP CRS Coordinator's Manual*, 340-1, 340-6 (2006).

¹⁸ *NFIP CRS Coordinator's Manual*, 510-12-16 (2006).

CONCLUSION

For the foregoing reasons, the petition should be granted.

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Respectfully submitted.

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APPENDIX

APPENDIX A

Cases in which NAHB has appeared as an amicus curiae or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl.*

Prot., 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States*, 128 S.Ct. 750 (2008); *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Env'tl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); and *Coeur Alaska, Inc. v. S.E. Alaska Cons. Council*, 486 F.3d 638 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).